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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-490

PENNSYLVANIA BANK AND TRUST COMPANY,
Executor of the Estate of ETHEL S. BRICE,
Deceased, Petitioner

v.

UNITED STATES OF AMERICA

PETITIONER'S REPLY MEMORANDUM

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1. The Government's reliance on *Fish v. United States,* 432 F.2d 1278 (C.A. 9, 1970) to support the opinion of the court below is misplaced. It is undisputed that from a time prior to the grant of the power until her death Mrs. Brice, the decedent here, continuously lacked legal capacity to exercise the power of appointment. Thus Mrs. Brice had no opportunity to determine the devolution of property. Unlike Mrs. Brice, the decedent in *Fish* was competent at the time the power of appointment was created, and she remained so for two years. This is a critical distinction, since—unlike Mrs. Brice—the decedent in *Fish* had two years within which to exercise legally a power of appointment. In short, the decedent in *Fish* had ample opportunity in fact *and in law* to determine the devolution of property—the hallmark of estate taxation—*Chase National Bank v. United States,* 248 U.S. 327, 334, 335, 338 (1929); Mrs. Brice admittedly had no such opportunity.

2. The Government also attempts to rely on Section 403(d)(2) of the Revenue Act of 1942 (56 Stat. 944). That provision, however, bears no relationship to the interpretation of the term "exercisable" as that term is used in Section 2041(a)(2) of the Internal Revenue Code. Rather, Section 403(d)(2) was merely a relief provision intended to aid those who were *temporarily* legally disabled, such as those serving in the military,[1] and who thus could not release or partially release powers of appointment at the time the law was changed in 1942 with respect to powers of appointment. See Paul, *Federal Estate and Gift Taxation,* 1946 Supplement p. 300. This relief provision, directed at those *temporarily* disabled from releasing a power, does not purport to define the term "exercisable" as used in Section 2041(a)(2), nor does it indicate a Congressional intent that a power of appointment be considered taxable and *"exercisable"* with respect to a donee—decedent who never had legal capacity to exercise the power. In order to accept the Government's interpretation of §403(d)(2) one would have to conclude that Congress intended to tax property which was never of any benefit to the decedent—donee and which she could never control. Any such conclusion would be contrary to the Congressional scheme of estate taxation designed to tax the use or control of property.

3. Finally, the Government tacitly recognizes that the decision of the court below is in conflict with four separate decisions of three courts, including the United

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1. Section 403(d)(2) provided in part that "an individual in the military or naval forces of the United States shall, until the termination of the present war be considered under a legal disability to release a power to appoint."

States Tax Court:

1. *Finley v. United States,* 404 F. Supp 200 (S.D. Fla. 1975), appeal pending, No. 78-1066 (5th Cir.);

2. *Estate of Gilchrist v. Commissioner,* 69 T.C. 5 (1977), appeal pending, No. 78-2400 (5th Cir.);

3. *Williams v. United States,* 78-2 U.S. Tax Cas. para 13,264 (W.D. Tex. 1978), appeal pending No. 78-3797 (5th Cir.);

4. *Estate of Reid v. Commissioner,* 71 T.C. 816, appeal pending, No. 79-3005 (5th Cir.).[2]

Nevertheless, the Government asserts that the conflict of the decision below with the decisions of the district courts and the Tax Court does not provide a basis for granting the petition and that if the Court were to defer its decision on the petition pending resolution of the cases on appeal there would result "an inordinate delay." This reference to "inordinate delay" betrays the weakness of the Government's position. As the Government notes, *Finley v. United States* has been set for oral argument by the Fifth Circuit on December 4, 1979—a few short weeks from the filing of this reply memorandum.[3] Accordingly, if this Court were to defer

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2. The Government does not dispute that even if the Court of Appeals for the Fifth Court were to reverse the Tax Court's decision in *Gilchrist* or *Reid,* the Tax Court will continue in other cases to reach the same result as in *Gilchrist* and *Reid* unless such cases are appealable to the Third or Fifth Circuits. See *Golsen v. Commissioner,* 54 T.C. 742 (1970).

3. It is only conjecture for the Government to suggest that *Finley* will be decided on jurisdictional grounds rather than on the merits.

its decision until *Finley* or the other cases were decided by the Fifth Circuit there would be no "inordinate delay". Moreover any assertion of "inordinate delay" is ill-founded because the petitioner seeks a *refund* of estate taxes that were paid in 1970. Thus only the petitioner and not the Government could be prejudiced by a delay in the disposition of this case.

In light of the conflicts between the decision below and the decisions of three other courts, including the United States Tax Court, it is respectfully submitted that certiorari be granted. In the alternative, if it is determined that the existing conflicts do not justify the grant of certiorari at this time, it is respectfully submitted that the ultimate determination as to the granting of certiorari be made after the Court of Appeals has issued an opinion in *Finley, Gilchrist* or *Williams.*

Respectfully submitted,

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